Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Requests of	)
	)
Kagan Media Partners, L.P.	)
	)
and	)
	) MM Dkt. 92-51
Equitable Capital Management Corporation	)
	) MMB File No. 900924A
For a Declaratory Ruling Concerning the Insulation of Limited Partners of Business Development Companies	)

To: The Commission

COMMENTS OF SACRAMENTO RSA LIMITED PARTNERSHIP

September 21, 1990

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SUMMARY

For the reasons stated in these Comments of Sacramento RSA Limited Partnership ("Sacramento"), the Commission, in the course of this proceeding, should address the relationship of the multiple ownership attribution guidelines to the alien ownership prohibitions of the Communications Act and the Commission's Rules. In particular, the Commission should reaffirm that compliance by a limited partnership with the attribution guidelines conclusively establishes that its alien limited partners are sufficiently "insulated" from control of its business activities so that grant of the limited partnership's radio applications will not be barred by the Act's alien ownership prohibitions. Moreover, the Commission should also reaffirm that, even if an applicant's limited partnership agreement fails to comply fully with the attribution guidelines, that applicant still retains flexibility to demonstrate that its alien limited partners are sufficiently insulated from control of the enterprise to permit grant of the partnership's applications. Sacramento demonstrates herein that the latter Commission directive -- which derives from the Commission's Wilner & Scheiner decision -- has been ignored by the FCC's Mobile Services Division ("MSD") in its consideration of Sacramento's application for a cellular radio license.

Sacramento supports a grant of the KMP and ECMC Petitions which prompted this proceeding, and particularly the ECMC Petition dealing with the interplay of the attribution guidelines and the alien ownership prohibitions. Such an action would be consistent with the flexibility the Commission stated

it would exhibit in determining whether alien limited partners are sufficiently insulated from a partnership's business activities so that Section 310(b) would not prohibit the grant of their partnership's radio applications -- regardless of whether the terms of their limited partnership agreement would result in the attribution of their interests for multiple ownership rule purposes. The experience of Sacramento with respect to its cellular radio rural service area ("RSA") application for the Texas 21 RSA demonstrates the necessity for Commission clarification in this regard.

The MSD has dismissed the Sacramento application because it has an alien limited partner and its partnership agreement does not comply fully with the safe harbor provisions of the attribution guidelines. However, as a matter of fact (because Sacramento's alien limited partner (Mr. Childs) has not exercised any of the limited rights he was accorded under the Agreement) and of law (because California law permits limited partners to exercise certain rights -- not comparable to those of corporate officers or directors -- which do not constitute management of the partnership's business), the MSD erred in concluding that Mr. Childs' participation in the Partnership as a limited partner violates Section 310(b) of the Act and rendered the Sacramento application defective from its inception.

Because the MSD's decision denies to applicants the flexibility the Commission said would be afforded them in demonstrating that their alien limited partners are sufficiently "insulated", this proceeding -- involving similar issues -- is an appropriate forum for addressing the questions raised by the MSD decision.

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To: The Commission

COMMENTS OF SACRAMENTO RSA LIMITED PARTNERSHIP

Sacramento RSA Limited Partnership ("Sacramento"), by its attorneys, and pursuant to the Commission's Public Notice of August 17, 1990 (DA 90-1098), hereby files it Comments on the above-referenced Petitions For Declaratory Ruling. For the reasons stated below, the Commission, in the course of this proceeding, should address the relationship of the multiple ownership attribution guidelines[1/] to the alien ownership prohibitions of the Communications Act and the Commission's Rules.[2/] In particular, the Commission should reaffirm that compliance

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1/ Attribution of Ownership Interests, 58 RR 2d 604 (1985) ("Attribution Reconsideration Order").

2/ 47 U.S.C. § 310(b); 47 C.F.R. § 22.4

by a limited partnership with the attribution guidelines conclusively establishes that its alien limited partners are sufficiently "insulated" from control of its business activities so that grant of the limited partnership's radio applications will not be barred by the Act's alien ownership prohibitions. Moreover, the Commission should also reaffirm that, even if an applicant's limited partnership agreement fails to comply fully with the attribution guidelines, that applicant still retains flexibility to demonstrate that its alien limited partners are sufficiently insulated from control of the enterprise to permit grant of the partnership's applications. Sacramento demonstrates herein that the latter Commission directive -- which derives from the Commission's Wilner & Scheiner[3/] decision -- has been ignored by the FCC's Mobile Services Division ("MSD") in its consideration of Sacramento's application for a cellular radio license.

I. THE PETITIONS FOR DECLARATORY RULING

The Kagan Media Partners, L.P. ("KMP") Petition seeks a Commission Declaratory Ruling that its limited partnership agreement sufficiently insulates "[its] limited partners to the extent that they are not deemed to hold any attributable interest in the Partnership's media

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3/ 103 FCC 2d 511 (1985), recon. 1 FCC Rcd 12 (1986).

interests despite the fact that the agreement does not strictly conform to the Commission's insulation criteria." KMP Petition at i. In particular, the KMP Agreement gives the limited partners the rights (1) to vote on the admission of additional general partners, without being subject to veto by the existing general partners, and (2) to remove general partners with or without a showing of cause. The Commission has held that if limited partners possess such rights they are not sufficiently insulated from the control of the partnership's business activities so as to exempt them from the attribution of those interests for purposes of the Commission's multiple ownership rules. Attribution Reconsideration Order, 58 RR 2d at 619-20.

The Equitable Capital Management Corporation ("ECMC") Petition focuses on the effect the Commission's attribution guidelines have on application of the alien ownership provisions of the Communications Act and the Commission's Rules. Accordingly, ECMC seeks a declaratory ruling that the limited partners in its partnerships are "adequately insulated from involvement in the management or operation of such Partnership's media investments so that the 'multiplier' can be used in order to determine compliance by each Partnership with the alien ownership limitations contained in Section 310(b) of the Communications Act of 1934, as amended." ECMC Pet. at i.

The limited partnership agreements which are the focus of the ECMC Petition provide all limited partners -- including any alien limited partners -- with voting rights pertaining to the election and removal of the managing general partner. ECMC Pet. at ii.

As with the KMP Agreements, such provisions would require attribution of the limited partners' holdings for purposes of the Commission's multiple ownership rules. And, as ECMC points out, if any of its limited partners are aliens, the "multiplier" may not be used to compute the interest held (through intervening domestically organized limited partnerships) by such "non-insulated" alien limited partners in a licensee (or applicant). ECMC Pet. at 2. See Wilner & Scheiner, 103 FCC 2d at 522. More significantly, as Sacramento has learned, under the Mobile Services Division's reading of Commission precedent, the presence of such provisions in a limited partnership agreement would prohibit the grant of any celluar radio application filed by such a limited partnership if the partnership included any alien limited partners.[4/]

Sacramento supports a grant of the KMP and ECMC Petitions, and particularly the ECMC Petition dealing with

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[4/] See Letter of Gregory J. Vogt, Chief, Mobile Services Division, to William D. Freedman, Counsel for Sacramento RSA Limited Partnership, July 17, 1990 (Ref. No. 63500-GJV) ("MSD Dismissal Letter")(Attached hereto as Exhibit A).

the alien ownership prohibitions.[5/] Such an action would be consistent with the flexibility the Commission stated it would exhibit in determining whether alien limited partners are sufficiently insulated from a partnership's business activities so that Section 310(b) would not prohibit the grant of their partnership's radio applications -- regardless of whether the terms of their limited partnership agreement would result in the attribution of their interests for multiple ownership rule purposes. The experience of Sacramento with respect to its cellular radio rural service area ("RSA") application for the Texas 21 RSA demonstrates the necessity for Commission clarification in this regard.

II. THE MOBILE SERVICES DIVISION'S DISMISSAL OF A SACRAMENTO RSA APPLICATION RAISES QUESTIONS ABOUT THE FLEXIBILITY THE COMMISSION SAID WOULD BE AFFORDED APPLICANTS IN DEMONSTRATING THE INSULATION OF THEIR ALIEN LIMITED PARTNERS

A. The Sacramento RSA Limited Partnership

The Sacramento RSA Limited Partnership was formed on June 28, 1988, well before the filing of its applications

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5/ While Sacramento supports the ECMC Petition it does not endorse all of the arguments made therein. In particular, as indicated below, Sacramento does not agree with ECMC that "[t]he insulation standards for alien ownership and attribution are identical." ECMC Pet. at n.5. Indeed, as Sacramento makes clear herein, the Mobile Services Division erred in holding that the attribution guidelines must be strictly applied in the alien ownership context. Sacramento's March 30, 1990 Response to an MSD letter of inquiry ("Sacramento Response") and its August 17, 1990 Petition For Reconsideration of the MSD's dismissal of its Texas 21 RSA application cited herein can be found in the Commission's records, File No. 10420-CL-P-672-A-89.

for inclusion in the Commission's lotteries for cellular radio rural service areas. Mr. Randall S. Butler is the sole General Partner of the Partnership, with full and exclusive charge and control of the management, conduct and operation of the Partnership in all matters and respects.[6/]

Stephen Childs, a U.S. resident British citizen and the only non-U.S. citizen in the Partnership is a 4.545 percent limited partner. Since joining the Partnership, Mr. Childs has not had any involvement whatsoever in the management or operation of the business of the Partnership.[7/]

The Sacramento Limited Partnership Agreement ("The Agreement") was drafted in accordance with the California Revised Limited Partnership Act ("CRLPA"). That Act provides limited partners with certain rights with respect to partnership activities which, under the CRLPA, do not constitute the exercise of management or control over the affairs of the limited partnership. As the Partnership's California counsel put it:

> These limited rights are similar to the rights of shareholders under California law. Section 15632 of the CRLPA . . . expressly considers such participation and codifies certain activities as to not

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6/ See Declaration of Randall S. Butler, attached to Sacramento Response, at ¶ 4 ("Butler Declaration").

7/ Declaration of Stephen Childs, attached to Sacramento Response, at ¶ 4 ("Childs Declaration").

> constitute participation in the management and control of the business. . . . [T]he [Partnership's] Agreement does not . . . in any way, convey powers, rights or duties to the limited partners comparable to those held by an officer or director of a corporation under California law. If anything, the limited rights accorded the limited partners are similar to, but lesser in scope than, the rights of shareholders under California law.[8/]

The Agreement explicitly states that the general partner of the Partnership shall have "sole and exclusive control of the Limited Partnership" (¶ 9.1) and that "the General Partner shall have full and exclusive charge and control of the management, conduct, and operation of the Partnership in all matters and respects."(¶ 11.1)

There are 22 limited partners in the Partnership. To the extent that the Agreement empowers each limited partner to vote on certain matters, the ability of such a partner to so vote is on the basis of the partner's percentage interest. Each of the provisions in the Agreement that provides for a limited partner vote on a substantive partnership matter requires either a unanimous vote of all 22 limited partners or the vote of limited partners holding a combined majority interest. In such matters, because Mr. Childs holds only a 4.545% interest and the limited partners hold an aggregate 90.9% interest in the Partnership, his vote among the limited partners

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8/ Opinion Letter of Tenant, Parshall, Read & Dutra, attached to Sacramento Response, at 1 ("TPR&D Opinion Letter")(emphasis added).

constitutes approximately 5% of the total required for action (4.545% divided by 90.9 = 5.044%).

B. The Mobile Services Division Decision

On June 14, 1988 Sacramento was selected as the non-wireline winner for the Texas 21 - Chambers Rural Service Area. Following an exchange of correspondence between the MSD and Sacramento's counsel, on July 17, 1990 the Mobile Services Division dismissed the application of Sacramento for the Texas 21 RSA. The MSD concluded that the Sacramento application was "defective and must be dismissed pursuant to Section 22.20 of the Commission's Rules." Specifically, the MSD focused on certain provisions in the Sacramento Limited Partnership Agreement and concluded:

> The provisions identified above do not comply with the guidelines outlined in the Attribution Reconsideration Order. Because the limited partnership agreement gives the limited partner the power to advise the partnership on day-to-day operations and to vote in [sic] the removal of the general partner, he has the ability to influence the affairs of the partnership. This fact is also true of the provisions giving the limited partner the right to be employed by the partnership or to act as an independent contractor. These rights give Mr. Childs powers comparable to those of a corporate officer or director. You argue in your March 30, 1990 letter that Mr. Childs has not in fact exercised any control over the partnership since its inception. This fact, even if it is assumed to be true, is unavailing. The terms of the partnership agreement are the best indication whether a particular limited partner has the power to participate in the management and operations of the partnership. A statement that the power has not or will not be exercised is insufficient to nullify the express terms of the agreement.[9/]

9/ MSD Dismissal Letter at 2 (emphasis added).

The MSD Dismissal Letter also concluded that "compliance with the California Limited Partnership Act, by itself, is insufficient to demonstrate that Mr. Childs is an insulated limited partner for purposes of compliance with Section 310(b) of the Act."

C. The Questions Raised by the MSD Should be Addressed in This Proceeding

On August 17, 1990, Sacramento filed a Petition For Reconsideration of the MSD action. Sacramento pointed out that, assuming the Commission's decision in Wilner & Scheiner was correct in holding that Section 310(b)'s prohibitions apply to limited partnerships, the MSD erred in dismissing Sacramento's application because Mr. Childs' participation satisfies the standards established in that decision. Sacramento's Petition demonstrated that as a matter of fact and of law Mr. Childs' powers are not comparable to those of corporate officers or directors or others holding "high level management positions" -- the test the Commission established in Wilner & Scheiner for the applicability of Section 310(b) to limited partnerships. That Petition is still pending.

Because the MSD's decision denies to applicants the flexibility the Commission said would be afforded them in demonstrating that their alien limited partners are sufficiently "insulated", this proceeding -- involving similar issues -- is an appropriate forum for addressing the questions raised by the MSD decision.

In Sacramento's case, the MSD was presented with an opinion of Sacramento's California counsel which stated that (1) the Sacramento Agreement was drafted in accordance with the California Revised Limited Partnership Act; (2) the CRLPA permits limited partners to exercise certain powers which do not constitute participation in the management and control of the business under the CRLPA; and (3) the Agreement does not "in any way, convey powers, rights, or duties to the limited partners comparable to those held by an officer or director of a corporation under California law." TPR&D Opinion Letter at 1. The MSD also had before it a Declaration from Sacramento's General Partner (as well as the terms of the Partnership Agreement) demonstrating that the General Partner has "full and exclusive charge and control of the management, conduct and operation of the Partnership." Butler Declaration at ¶ 4. Finally, it had Mr. Childs' Declaration demonstrating that he had "no involvement in the control or management of the Partnership's cellular radio business." Childs' Declaration at ¶ 4.

Therefore, even under the Wilner & Scheiner standards, the Agreement did not provide Sacramento's alien limited partner with the ability to exercise the type of influence over the affairs of the Partnership sought to be prohibited by Section 310(b). As a matter of fact (because Mr. Childs had not exercised any of the limited rights he was accorded

under the Agreement) and of law (because the CRLPA permits limited partners to exercise certain rights -- not comparable to those of corporate officers or directors -- which do not constitute management of the Partnership's business), the MSD erred in concluding that Mr. Childs' participation in the Partnership as a limited partner violates Section 310(b) of the Act and rendered the Sacramento application defective from its inception.

The source of the MSD's error was its rote application of the Commission's broadcast multiple ownership Attribution Reconsideration guidelines as a conclusive presumption to answer the question whether a limited partnership agreement runs afoul of Section 310(b). The guidelines were never intended to serve that purpose and it was error for the MSD to so employ them in Sacramento's case.

In Wilner & Scheiner the Commission recognized that the test it created for determining whether a limited partner had "powers comparable" to corporate officers and directors was not simple to apply. It stated that the test would be "whether alien limited partners do not in fact substantially participate in the management or operations of the business." 103 FCC 2d at n. 43 (emphasis added). Thus, even under Wilner & Scheiner, the presence of an alien limited partner in an applicant, unlike that of an alien general partner, does not automatically render the grant of the partnership's application in violation of Section 310(b).

To assist applicants in assessing the eligibility of their alien limited partners, the Commission in Wilner & Scheiner referred to the guidelines established in its Attribution Reconsideration Order. Id. However, it most emphatically did not state that the failure to satisfy all of the attribution guidelines would result in a determination that the presence of an alien limited partner would prohibit grant of the partnership's application under Section 310(b).

Nor could the Commission have so concluded and remained consistent with the statements it had made in adopting the attribution guidelines, indicating the manner in which those guidelines were to be used. In that proceeding, the Commission made plain that the "sole effect of the attribution criteria adopted in this proceeding is that the interest of the 'active' limited partner in the limited partnership is counted in the application of the multiple ownership rules." 58 RR 2d at 615. The Commission has observed that the attribution guidelines were intended for "the distinct context of applying our media multiple ownership rules" (Id. at 614), whereas the alien ownership restriction "is unique in several respects," and differs from the multiple ownership

rules in its aim as well as "in its scope and effect."[10/]

Therefore, it is understandable that while the Commission concluded in Wilner & Scheiner that alien limited partners "who conform to these [attribution] criteria will not be subject to the restrictions governing alien officers or directors," it stated that, in other cases, an applicant would be permitted "flexibility in the manner in which it chooses to demonstrate this lack of participation." 103 FCC 2d at n.43.

In Sacramento's case, the MSD permitted no such flexibility. Despite the fact that Sacramento demonstrated that, under state law, its Agreement did not "convey[ ] powers comparable to those held by an officer or director of a corporation" to its limited partners and that Mr. Childs did "not in fact substantially participate in the management and operations of the business," the MSD

10/ Attribution Report and Order, 97 FCC 2d 997, 1009 (1984). Indeed, in adopting the guidelines, the Commission noted that they "are not incorporated into our rules and serve only to indicate the type of insulation the Commission will consider in evaluating challenges to the exclusion." Attribution Reconsideration Order, 58 RR 2d at 619. The attribution rules were later held applicable in determining whether a particular limited partner should be included in considering the applicant's diversity of ownership showing and the proposed integration into management in comparative broadcast hearings. Daytona Broadcasting Co., 60 RR 2d 1199 (1986). However, the Commission does not apply strictly the attribution guidelines in other contexts involving limited partnerships, such as determining the eligibility of such partnerships for lottery preferences or distress sale and tax certificate treatment. Attribution Reconsideration Order, 58 RR 2d at 614; Minority Ownership In Broadcasting, 52 RR 2d 1301 (1982).

dismissed the Sacramento application, merely noting that certain provisions in the Partnership Agreement "do not comply with the guidelines outlined in the Attribution Reconsideration Order."[11/]

In mechanically applying the mass media attribution guidelines to dismiss a cellular radio application the MSD ignored the Commission's warnings in Wilner & Scheiner that "the attribution criteria are not exhaustive or dispositive in the context of alien ownership" and that "the attribution standards and the alien ownership provisions differ in scope and effect." 103 FCC 2d at 524 and n.56. Indeed, the MSD's decision was without precedent.[12/] In fact, in the only Commission decision dealing with the application of Section 310(b) to cellular radio applicant partnerships, the Commission stated explicitly that "[l]imited partners are treated as stockholders for purposes of a Section 310(b) analysis." Continental

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11/ MSD Dismissal letter at 1. The MSD pointed to provisions giving the limited partner the power to advise the partnership on day-to-day operations, to vote on the removal of the general partner, and the right to be employed by the partnership or to act as an independent contractor.

12/ Because the Commission has never held that the Attribution guidelines are to be applied in the cellular context to conclusively determine whether an application violates Section 310(b), let alone to determine the acceptability of applications, the MSD exceeded the Bureau's delegated authority by deciding a novel question of law which could not be resolved under outstanding precedents and guidelines. See 47 C.F.R. § 0.291(a)(2).

Cellular, 5 FCC Rcd 691, 692 n.8 (1990).[13/]

Since the objectives of Section 310(b) of the Act and those of the ownership attribution guidelines are not the same, those guidelines cannot provide a conclusive presumption when determining whether a certain degree of permitted participation by an alien limited partner in a partnership's activities violates the statutory ban on alien ownership. Because Sacramento's limited partners could not exercise powers comparable to corporate officers and directors under the Agreement, and Mr. Childs has not done so in fact, the MSD dismissal of its application was error.

D. The Commission Should Reject the MSD's Interpretation of the Role the Attribution Guidelines Play in the Application of Section 310(b)

The relevance of the KMP and ECMC Petitions to Sacramento's case is clear. KMP and ECMC persuasively argue that the attribution guidelines themselves must be applied with flexibility to accommodate, among other things, state partnership law and state and federal securities law. Indeed, ECMC makes its request with respect to the application of the alien ownership prohibitions, going so

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13/ The Continental Cellular case involved application of the Wilner & Scheiner decision to the cellular context but did not involve application of the Attribution guidelines, since Continental addressed the eligibility of an applicant with an alien general partner and general partners were deemed to be equivalent to corporate officers and directors in Wilner & Scheiner. In Continental, as it did in Wilner & Scheiner, the Commission specifically equated the officers and directors barred by Section 310(b) with "non-limited partners." 5 FCC Rcd at 691.

far as to request a "waiver" if the requested Declaratory Ruling is not forthcoming.[14/]

Sacramento too asks only that the Commission reaffirm its position in Wilner & Scheiner that, in assessing the applicability of the alien ownership prohibitions to limited partnerships, the attribution guidelines are indeed only guidelines. They must be applied with discretion, not mechanically, to determine if a given alien limited partner is barred from ownership under the Act. Most important, the limited partnership must be permitted the flexibility Wilner & Scheiner said it would be accorded to demonstrate that its alien limited partner is in fact adequately insulated from the business activities of the partnership to avoid application of the alien ownership prohibitions to the partnership. In Sacramento's case, the MSD did not permit the flexibility mandated by the Commission in Wilner & Scheiner.

CONCLUSION

For the reasons stated above, the Commission should take the opportunity afforded by the KMP and ECMC petitions to reaffirm the flexibility it called for in Wilner & Scheiner

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14/ ECMC Pet. at 40. Under the MSD's reading of the interplay of the attribution guidelines and the alien ownership prohibitions, no such "waiver" is possible. It is the MSD's view that the failure to comply fully with the attribution guidelines dictates automatic application of the alien ownership prohibitions of Section 310(b), and, of course, the FCC may not "waive" provisions of the Act.

with respect to the limited role the attribution guidelines play in assessing the applicability of Section 310(b) to a limited partnership with an alien limited partner.[15/]

Respectfully submitted,

September 21, 1990

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RSA Limited Partnership

15/ For purposes of applying Section 310(b), there can be no distinction drawn between the type of widely-held "business development companies" allegedly represented by KMP and ECMC and a less widely-held partnership like Sacramento. Under the MSD's view, any limited partnership whose partnership agreement fails to conform to all of the safe harbor provisions of the attribution guidelines, provides an alien limited partner with the opportunity to "influence the affairs of the partnership" in such a manner that Section 310(b) bars the grant of the partnership's radio applications.

0192G

EXHIBIT A

MDS Dismissal Letter - July 17, 1990

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 17, 1990

In Reply Refer To:
63500-GJV

William D. Freedman
Gurman, Kurtis, Blask
& Freedman
Suite 500
1400 Sixteenth Street,N.W.
Washington, D.C. 20036

Re: Application of Sacramento RSA Limited Partnership, RSA Market No. 672A, Texas 12 - Chambers, File No. 10420-CL-P-672-A-88

Dear Mr. Freedman:

You filed the above-captioned application on behalf of Sacramento RSA Limited Partnership (Sacramento). After reviewing the captioned application and your March 30, 1990 response to my letter dated March 12, 1990, the staff has concluded that the application is defective and must be dismissed pursuant to Section 22.20 of the Commission's rules.

The application proposes that a license be granted to Sacramento. Stephen Childs, a citizen of Great Britain, hold a 4.545 percent limited partnership interest in Sacramento. The partnership agreement provides in relevant part that the limited partner may, among other things, act as an employee or independent contractor for the partnership, communicate with the managing general partner on the day-to-day operations of the enterprise, and may vote on the removal of the managing general partner.

The Commission in Wilner & Shiner, 103 FCC2d 511, 520 n.43 (1985), recon., 1 FCC Rcd 12 (1986), indicated that Section 310(b) of the Communications Act prohibits a partnership which has an alien general partner or noninsulated limited partner from holding a Commission license. The Commission found that the applicant bears the burden of proving that a particular limited partner is in fact insulated from the management and operations of the partnership and that the Commission would utilize the guidelines set forth in Attribution Reconsideration Order, 50 Fed. Reg. 27,438 (July 3, 1985), to determine whether a particular limited partner was in fact insulated.

The provisions identified above do not comply with the guidelines outlined in the Attribution Reconsideration Order. Because the limited partnership agreement gives the limited partner the power to advise the

partnership on day-to-day operations and to vote in the removal of the general partner, he has the ability to influence the affairs of the partnership. This fact is also true of the provisions giving the limited partner the right to be employed by the partnership or to act as an independent contractor. These rights give Mr. Childs powers comparable to those of a corporate officer or director. You argue in your March 30, 1990 letter that Mr. Childs has not in fact exercised any control over the partnership since its inception. This fact, even if it is assumed to be true, is unavailing. The terms of the partnership agreement are the best indication whether a particular limited partner has the power to participate in the management and operations of the partnership. A statement that the power has not or will not be exercised is insufficient to nullify the express terms of the agreement.

You argue that the Attribution guidelines should not be applied to your client's application. Although the Commission indicated in Wilner & Shiner that applicants would be given the flexibility to demonstrate insulation, nowhere in that order did the Commission indicate that failure to meet several of the explicit Attribution guidelines could be overcome by the mere statement that a partner has not exercised any role in the management of the partnership. In addition, in the Attribution Reconsideration Order the Commission clearly indicated that compliance with the Uniform Limited Partnership Act was not enough to show insulation. Consistent with this Commission conclusion, compliance with the California Limited Partnership Act, by itself, is insufficient to demonstrate that Mr. Childs is an insulated limited partner for purposes of compliance with Section 310(b) of the Act.

You also offer to amend the limited partnership agreement to insulate Mr. Childs from a management role and have included an irrevocable proxy, signed by Mr. Childs on March 29, 1990, giving a United States citizen partner the right to vote Mr. Childs' partnership share. A cellular application which is defective at the time it is filed cannot be amended to correct the defect. See Continental Cellular, 5 FCC Rcd 691, 692 (1990). Therefore, the captioned application is dismissed as defective pursuant to Section 22.20 of the Commission's rules.

It is possible that Sacramento's application might also be defective for other reasons but in an effort to best utilize our limited resources, once an application has been found unacceptable for filing for any reason, any further processing of that application ceases.

Sincerely,

Gregory J. Vogt

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

cc: Sacramento RSA Limited Partnership

Rm 209
ltr attached

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

MOBILE SERVICES DIVISION DISMISSES NONWIRELINE CELLULAR APPLICATION AS DEFECTIVE IN MARKET 672

Report No. CL-90-255 July 19, 1990

After review of the winning application in the lottery held for the following market, the application has been found to be defective and has been dismissed.

Market No. 672 A Texas 12 - Chambers

Sacramento RSA Limited Partnership, File No. 10420-CL-P-672-A-88

The application was dismissed by the Commission's letter dated July 17, 1990 for failure to comply with Section 310(b) of the Communications Act of 1934, as amended.

- FCC -